STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 18, 2006
V	No. 258698 Oakland Circuit Court
MICHAEL DAVID BERZSENYI, Defendant-Appellant.	LC No. 2003-193291-FH

Before: Sawyer, P.J., and Wilder and H. Hood*, JJ.

PER CURIAM.

Defendant appeals as of right his August 13, 2004, jury trial conviction of delivery of 50 grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii).[1] Defendant was sentenced to 10 to 20 years' imprisonment. We affirm.

I

Defendant's conviction arose from a May 14, 2002 undercover drug buy. A police informant had arranged to meet co-defendant Kenneth Hoffman to purchase two ounces of cocaine (approximately 56 grams). After receiving $2,500.00 in prerecorded narcotic "buy money" from the informant, Hoffman met with defendant at a nearby restaurant to obtain the cocaine. Seconds later, as Hoffman returned to deliver the cocaine to the informant, he was immediately arrested. A police search of Hoffman's vehicle revealed a total of 55.7 grams of

[1] On the date of the offense, MCL 333.7401(2)(a)(iii) prescribed a minimum ten-year sentence for persons found guilty of possession with intent to deliver 50 or more but less than 225 grams of cocaine. 2002 PA 665 and 2002 PA 670, effective March 1, 2003, amended MCL 333.7401. The amendments, among other things, eliminated the requirement that the sentencing court impose a minimum term of not less than ten years under MCL 333.7401(2)(a)(iii). The new offense of delivery of fifty grams or more but less than 450 grams of heroin is now punishable by imprisonment for not more than twenty years or by a fine of $250,000, or both. MCL 333.7401(2)(a)(iii).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

cocaine on the back seat. On his person, the police found 3.7 grams of cocaine and $100.00 of the prerecorded drug buy money. Hoffman informed the police he had purchased the drugs in question from defendant, who was subsequently arrested and charged with the instant offense.[2] After defendant was convicted as charged, defendant filed a motion for a downward departure from the sentencing guidelines based on his lack of a criminal record, his strong family ties, and his likelihood for rehabilitation. Defendant also sought retroactive application of the recent amendments to MCL 333.7401, and argued alternatively that the recent amendments constituted objective and verifiable reasons to depart from the mandatory minimum sentence of 10 to 20 years' imprisonment in effect at the time of the offense. After hearing arguments, the trial court concluded it was obligated to sentence defendant in accordance with the mandatory minimum sentence of 10 to 20 years' imprisonment, as provided by MCL 333.7401 as it existed on May 14, 2002. Defendant now appeals.

II

Constitutional questions are questions of law that this Court reviews de novo on appeal. *Morales v Parole Bd*, 260 Mich App 29, 49; 676 NW2d 221 (2003). Whether a statute should be applied retroactively is a legal issue that is also reviewed de novo. *People v Doxey*, 263 Mich App 115, 118; 687 NW2d 360 (2004), citing *People v Thomas*, 260 Mich App 450, 458; 678 NW2d 631 (2004), and the construction or application of statutory sentencing guidelines presents a question of law which is also reviewed de novo. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). In reviewing a sentence where the trial court departs from the guidelines, we review the existence or nonexistence of a particular factor for clear error, *id.*, and we review de novo whether that factor is objective and verifiable. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). Whether an objective and verifiable factor constitutes a substantial and compelling reason to depart from the guidelines is reviewed for an abuse of discretion. *Id.*

III

Defendant first asserts that he should be resentenced under the amended version of MCL 333.7401. We disagree. As a general rule, the proper sentence is that which was in effect at the time the offense was committed. See *People v Schultz*, 435 Mich 517, 530; 460 NW2d 505 (1990). This Court has held that the amended statutory scheme in MCL 333.7401 applies only to offenses committed on or after March 1, 2003. *Doxey*, *supra* at 122-123; *Thomas*, *supra* at 458-459. Because the offense in this case occurred on May 14, 2002, we conclude defendant was properly sentenced to a minimum ten-year sentence under the statute in effect at the time of the offense.

Contrary to defendant's argument, *Schultz* does not require that the amendments to MCL 333.7401 retroactively apply to this case. This Court has previously recognized that *Schultz* was a plurality decision and, thus, non-binding under the rule of stare decisis. See *Doxey*, *supra* at 120; *Thomas*, *supra* at 457 n 1. Further, 2002 PA 665 substantively changed the punishable

[2] Hoffman entered a plea of guilty in a separate proceeding.

offenses under MCL 333.7401 such that the amended statute could not apply to the offense for which defendant was convicted:

> The amending act here, 2002 PA 665, not only amelioratively amended the sentencing provision of the statute, but also changed the breakdown of the prohibited conduct contained in the statute, including the addition of a new crime of delivery of over 100 grams, 2002 PA 665(2)(a)(i), a new crime of delivery of 450 to 1,000 grams, 2002 PA 665(2)(a)(ii), a new crime of delivery of 50 to 450 grams 2002 PA 665(2)(a)(iii), and a new crime of delivery of less than 50 grams, 2002 PA 665(2)(a)(iv). Plainly . . . the amended statutes here do not proscribe the same conduct as did the former drug law. [*Doxey, supra* at 120-121.]

Thus, *Schultz* is factually inapposite.

Finally, our Supreme Court has concluded that the amendments to MCL 769.34 shall be applied prospectively:

> . . . . [MCL 769.34(2)] provides that courts shall sentence defendants in accord with the minimum sentences prescribed by the "version of those sentencing guidelines in effect on the date the crime was committed." This demonstrates a legislative intent to have defendant sentenced under the law in effect on the date of his offense, which predated the amendment to MCL 333.7401. [*People v Dailey*, 469 Mich 1012, 1019; 678 NW2d 439 (2004).][3]

We also find no merit to defendant's claim that the trial court violated his rights to due process by failing to rule on his motion seeking a downward departure. The record shows that defendant thoroughly briefed the issue and that the trial court complimented each party on their briefs, "having reviewed them." The trial court further asked each party whether "anything new or different from [their] Sentencing Memorandum" would be offered at the sentencing hearing, thus, the record shows the trial court was aware of the issues presented. The fact that the trial court did not expressly state it was denying defendant's motion does not warrant remand for resentencing. Because the trial court sentenced defendant within the guidelines, the trial court clearly rejected defendant's request to sentence him under the amended version of MCL 333.7401 and/or downward depart from the guidelines. In doing so, the trial court at least implicitly ruled on the motion.[4]

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[3] Although the Supreme Court acted through an order in *Dailey*, "[a]n order that is a final Supreme Court disposition of an application and that contains a concise statement of the applicable facts and reasons for the decision is binding precedent." *Dykes v William Beaumont Hosp*, 246 Mich App 471, 483; 633 NW2d 440 (2001), citing *People v Crall*, 444 Mich 463, 464 n 8; 510 NW2d 182 (1993).

[4] We also note defendant was free to seek clarification of the trial court's ruling and failed to do so. A defendant may not "harbor error as an appellate parachute." *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

Moreover, "[t]he Legislature intended to give trial courts discretion to depart from the presumptively mandatory sentences only in exceptional cases." *People v Arcos*, 206 Mich App 374, 376; 522 NW2d 655 (1994), citing *People v Downey*, 183 Mich App 405, 416; 454 NW2d 235 (1990). On the record before us, we find no abuse of discretion in the trial court's decision not to depart from the mandatory minimum sentence. See *People v Garza*, 246 Mich App 251, 256; 631 NW2d 764 (2001); *Arcos, supra* at 376.

Defendant next claims that his right to due process was violated when the trial court was first misinformed by the prosecutor that defendant would be eligible for parole under MCL 791.234(12), and then prevented defense counsel from rebutting the prosecutor's alleged inaccurate statement. Because defendant did not raise these claims below, these unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 767, 734; 597 NW2d 130 (1999).

MCL 791.234(12) provides:

> An individual convicted of violating or conspiring to violate section 7401(2)(a)(iii) or 7403(2)(a)(iii) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, before March 1, 2003 is eligible for parole after serving the minimum of each sentence imposed for that violation or 5 years of each sentence imposed for that violation, whichever is less.

We agree that the prosecution inaccurately stated the law. Because defendant was sentenced after March 1, 2003, he clearly is not eligible for parole under MCL 791.234(12).[5] Nevertheless, no plain error occurred because, as we have already concluded, defendant was properly sentenced under MCL 333.7401.

Finally, defendant asserts his ineligibility for sentencing under the amended version of MCL 333.7401(2)(a)(iii) and his ineligibility for parole under MCL 791.234(12) violate his right to equal protection. Because defendant failed to challenge his sentences on this specific basis at sentencing, our review is limited to determining whether there is plain error that affects defendant's substantial rights. *Carines, supra*.

There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. *Morales, supra* at 50, citing *Hurst v Dep't of Corrections*, 119 Mich App 25, 28-29; 325 NW2d 615 (1982). Thus, defendant's claims are subject to rational basis scrutiny. *Harvey v State*, 469 Mich 1, 6-7; 664 NW2d 767 (2003). Under the rational basis test, legislation is not unconstitutional because it is of a particular kind or character or it benefits a particular class, if it affects all those within a class equally. *Id.* Rather, legislative classifications which do not implicate a fundamental right or target a suspect class are presumed to be constitutional and the Legislature's reasons for the legislation will not

[5] MCL 791.234(12) was amended by 2002 PA 670 to provide that an individual convicted of violating MCL 333.7401(2)(a)(iii) or 7403(2)(a)(iii) before March 1, 2003 is now eligible for parole after serving one-half of the minimum term imposed for that violation or five years of each sentence imposed for that violation, whichever is less.

be questioned unless it is palpably arbitrary or unreasonable. *Id*.; *People v Cooper (After Remand)*, 220 Mich App 368; 372; 559 NW2d 90 (1996).

We conclude that MCL 791.234(12) withstands rational basis scrutiny. First, the grant of parole is discretionary with the parole board, MCL 791.234(9); *Morales, supra* at 35, and eligibility for parole does not guarantee that a prisoner will be released. *In re Parole of Johnson*, 235 Mich App 21, 22; 596 NW2d 202 (1999). Thus, some defendants who may be eligible for parole under MCL 791.234(12) may not necessarily be released any earlier than defendant.

Moreover, this Court has specifically recognized that "[l]egislative schemes distinguishing various categories of prisoners for parole eligibility purposes 'require only some rational basis to sustain them,'" *Hawkins v Dept of Corrections*, 219 Mich App 523; 528; 557 NW2d 138 (1996), citing *McGinnis v Royster*, 410 US 263, 270; 93 S Ct 1055; 35 L Ed 2d 282 (1973). Under this principle we have concluded that the legislature's decision to prevent parole detainees from receiving credit for time served while being held on a parole detainer did not violate equal protection guarantees because parolees, unlike persons who were in jail awaiting trial, had a debt to society not yet fully paid, *People v Stewart*, 203 Mich App 432, 434; 513 NW2d 147 (1994), and that a prisoner's inability under MCL 791.234(9) to appeal parole denials did not violate equal protection laws, because the exclusion was rationally related to the Legislature's legitimate interest in saving public funds in response to frivolous requests by prisoners for review of the Parole Board's denials of parole. *Morales, supra* at 52.

We similarly find that the classifications under MCL 791.234(12) are rationally related to a legitimate government interest. Parole laws represent "the State's sensitive and difficult effort to encourage for its prisoners constructive future citizenship while avoiding the danger of releasing them prematurely upon society." *McGinnis, supra* at 269-70. Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with "mathematical nicety," or even whether it results in some inequity when put into practice. Rather, "[a] classification reviewed [under rational basis scrutiny] passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Harvey, supra* at 7. The Michigan Legislature's decision to establish a system providing a measured reduction in the prison population and a measured release of parolees into the community at large is supported by sufficient facts to survive constitutional scrutiny.

Given that defendant's conviction and sentence are valid under MCL 8.4a, we conclude defendant has not met his burden of demonstrating that the classifications under MCL 791.234(12) are arbitrary or capricious. Defendant's equal protection claim is without merit. *Morales, supra* at 51.

Affirmed.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Harold Hood